No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BILLY JOE HUNT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS AMICUS CURIAE SUPPORTING RESPONDENT

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AMICUS CURIAE BRIEF[1]

Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief in support of respondent.

INTEREST OF THE AMICUS

TAFEF is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the qui tam provisions of the False Claims Act ("FCA"), has participated in litigation as amicus curiae, and has provided testimony to Congress about ways to improve the FCA.

TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986—contemporaneously with the statutory amendments at issue in this case. TAFEF is supported by whistleblowers and their counsel and funded by membership dues and foundation grants.

TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. In this case, TAFEF's interest is in ensuring that the statute of limitations applicable to whistleblower claims—including in declined cases—is interpreted

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[1] This brief is filed with the consent of all parties, reflected in blanket consent letters filed with the Court. Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for the amicus made any monetary contribution toward the preparation and submission of this brief.

consistently with the statutory text and Congress's purposes in enacting the 1986 amendments.

SUMMARY OF ARGUMENT

Section 3730 of the FCA provides a cause of action to redress fraud against the United States. Such actions may be brought by the United States, but are most often brought by qui tam relators. When a relator brings the action, the United States may intervene—but frequently, the United States declines to intervene and allows the relator to carry the action forward.

The timeliness of these actions is governed by Section 3731(b) of the FCA, which sets forth two alternative limitations periods: a six-year period that begins when the fraud occurs; and a three-year period that begins when the responsible official of the United States discovers facts material to the fraud, subject to a ten-year statute of repose. As between these two periods, the statute provides that "whichever occurs last" shall govern.

This case is about whether the ordinary statute of limitations applies in the ordinary qui tam case in which the United States declines to intervene (respondent's position), or whether instead only the first half of Section 3731(b) applies in such cases (petitioners' position). The statutory text answers that question clearly in respondent's favor.

I. Section 3731(b) applies without regard to the identity of the plaintiff. Thus, under the clear terms of Section 3731(b), either limitations period may apply to a qui tam relator's civil action under Section 3730—whether the government subsequently intervenes or not. Petitioners disparage this plain-text reading as "hyperliteral," Petr. Br. 3, 11, "unduly literal," Petr. Br. 15, and "literalistic," Petr. Br. 35. We take these accusations as compliments. To read the statute "literally" is to adhere to its ordinary construction or meaning, without embellishment. That is what this Court ordinarily strives to do—and it is what the Court should do here.

A. All of the ordinary tools of statutory interpretation favor respondent's reading of Section 3731(b). Respondent's interpretation is faithful to the ordinary meaning of the words Congress used, and gives each provision a single, clear effect. It treats all civil actions to redress fraud against the United States consistently; it gives meaning to the phrase "whichever occurs last"; and it avoids the oddity of conditioning the applicable limitations period on the government's post-filing decision whether to intervene.

Petitioners' interpretation, on the other hand, is inconsistent with the statutory text. To make petitioners' interpretation work, the single statutory phrase "civil action under section 3730" must hold two, mutually exclusive meanings: it must simultaneously include qui tam actions in which the government has not intervened (for purposes of subsection (b)(1)) and exclude those very same actions (for purposes of subsection (b)(2)). But that maneuver is squarely foreclosed by this Court's decision in *Clark v.*

Martinez, 543 U.S. 371, 386 (2005), which rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases."

The statutory context likewise supports respondent's interpretation. Throughout the FCA, Congress demonstrated that it knows how to distinguish between the United States and private relators. Congress also knows how to modify statutes of limitations to account for the government's intervention decisions.

In an effort to displace the ordinary meaning of the statute, petitioners rely on this Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), which held that the phrase "civil action under section 3730" does not cover FCA retaliation claims. *Graham* actually supports respondent: the Court there clearly distinguished fraud claims (like this case), which are subject to Section 3731(b), from retaliation claims, which are not. To the extent *Graham* provides guidance about statutory interpretation more generally, it stands only for the unremarkable proposition that the words of a statute should be read in context to avoid absurd results. But *Graham* provides no support for petitioners' more radical theory that the phrase "civil action under section 3730" simultaneously holds multiple, mutually exclusive meanings.

Petitioners also argue that their interpretation is consistent with a default rule that tolling provisions and discovery rules normally begin to run when the plaintiff discovers a fraud. They contend that because Section 3731(b)(2) makes the government's discovery the relevant trigger, the government is the only

eligible plaintiff. That argument puts the cart before the horse. The reason discovery rules ordinarily turn on the plaintiff's knowledge is because the plaintiff is typically also the victim of a fraud. But when, as here, the victim and the plaintiff are different people, the ordinary rule is that the victim's knowledge controls. For example, when a victim assigns a claim to a plaintiff, the assignor victim's knowledge determines when the limitations period begins to run. Thus, the applicable default rule actually favors respondent.

B. The statutory purpose and legislative history also support respondent's interpretation. Petitioners extract snippets from the legislative history of Section 3731(b) showing that Congress intended to grant a benefit to the government—and they proceed from there to the conclusion that Congress meant to deny that benefit to qui tam relators.

Petitioners' argument reflects a deep misunderstanding of the relationship between relators and the government. Congress enacted the current version of Section 3731(b) as part of a comprehensive effort to revitalize the FCA's qui tam provisions and encourage more private suits. Congress believed that increased private enforcement was the only way to stem the tide of fraud against the government—and it therefore understood that private civil actions (including actions in which the government does not intervene) serve a vital public purpose. Respondent's interpretation preserves more of these actions, and conserves public resources by allowing the government to decline intervention without forfeiting its right to recover stolen funds.

Petitioners' argument is also unpersuasive because, at most, it proves that the solution Congress

chose is broader than the problem it sought to address. But that happens all the time. What we know for sure is that Congress regarded the six-year statute of limitations as inadequate and sought to lengthen it. There is no evidence that it only wished to do so selectively in a way that would disadvantage qui tam relators—the very individuals it was encouraging at the time.

Petitioners warn of policy consequences if the statute is interpreted as written. They worry that relators will sit on their claims to pad the damages, and that the government will face burdensome discovery into its knowledge. But none of these supposed practical problems outweighs the policy concerns on the other side: that claims to recover money for the government will fail unless the government spends its own resources to take over the case; and that relators may choose not to come forward if they fear that their declined claims will be dismissed as time-barred or limited in scope. In any event, petitioners' concerns are meritless. Congress provided strong incentives for relators to file promptly—including the first-to-file bar and the public disclosure bar. Moreover, discovery regarding the government's knowledge is likely to be limited, and is already occurring in connection with the merits of FCA actions.

II. Section 3731(b)(2) provides that the three-year discovery period begins to run when "the official of the United States charged with responsibility to act in the circumstances" learned or should have learned about facts material to the fraud. In other words, the discovery clock starts running when a government official learns of the fraud.

Petitioners argue that in declined cases, it is the qui tam relator's knowledge that starts the clock. But a private relator is not an "official of the United States." The relator is not even a government employee—let alone an "official" "charged" with a duty to act in the face of fraud. Instead, the relator is a private individual who is permitted to pursue an action for the government's benefit—but is not able to bind the government or exercise the government's authority. Petitioners have no plausible explanation for how the government's decision to decline intervention transforms a private individual into a government official.

Taken at face value, petitioners' interpretation also risks rendering the discovery rule a nullity in declined cases. Even if a relator becomes an official of the United States at the moment of declination, there would be no justification for using the relator's knowledge prior to that date to start a limitations period. Thus the statute of limitations would begin to run on the declination date—which necessarily occurs after the suit is filed. The fact that petitioners' interpretation compels that absurd result discredits petitioners' argument.

This Court should affirm.

ARGUMENT

I. The False Claims Act's statute of limitations applies equally to every plaintiff.

A. Section 3731(b) unambiguously applies to all suits to redress fraud against the United States.

Section 3731(b) provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

Section 3731(b) has a single, clear meaning: the statute applies in full to civil actions under Section 3730—whether brought by the government or a qui tam relator, and whether the government decides to intervene or declines to do so. In every such action, whichever limitations period occurs last governs.

Petitioners urge a different interpretation: they want the limitations period set forth in Section 3731(b)(2) to apply to only those civil actions in which the government is the plaintiff, either because it sues or subsequently intervenes. To write a statute that

works the way petitioners propose, Congress could have easily written something like this:

> (b)
>
> (1) A civil action under section 3730(b) in which the United States has subsequently chosen not to intervene may not be brought more than 6 years after the violation of section 3729 is committed.
>
> (2) A civil action under section 3730(a) or under section 3730(b) in which the United States subsequently chose to intervene may not be brought
>
> (i) more than 6 years after the violation of section 3729 was committed, or
>
> (ii) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

But of course, Congress did not enact that statute—and the striking contrast between the actual statute and petitioners' desired alternative reveals how far petitioners have strayed from the text. Under this Court's precedents, the choice between these competing interpretations is clear.

1. Respondent's interpretation is the only one consistent with the statutory text.

The key inquiry for deciding whether Section 3731(b) applies to any particular action is whether that action is a "civil action under section 3730," *i.e.*, an action under the FCA to redress fraud against the United States. If it is, the later date between (b)(1) and (b)(2) applies.

This case—like every other FCA fraud case—was brought "under section 3730." *See* 31 U.S.C. § 3730(b)(1) (permitting any person to bring a civil action alleging a violation of Section 3729); *id.* § 3730(c)(3) (allowing a relator to continue to conduct a private action after the United States declines to intervene); Petr. Br. 7 (acknowledging that this case is a "civil action under section 3730" for the purposes of Section 3731(b)(1)). Thus, under the plain text, Section 3731(b)(2) is available—and it applies because it occurred last. That should be the end of the matter.

Petitioners' contrary interpretation demands that this Court give a single statutory phrase—"civil action under section 3730"—two mutually exclusive meanings. To make petitioners' theory work, that term must include qui tam suits where the government declines to intervene for purposes of subsection (b)(1), and exclude those very same suits for purposes of subsection (b)(2).

This Court has emphatically rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005); *see also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (explaining that "a *single* [statutory] formulation"

should be construed "the same way each time it is called into play"). The provision of the Immigration and Nationality Act at issue in *Clark* said that three categories of aliens "may be detained beyond the removal period." 543 U.S. at 377 (quoting 8 U.S.C. § 1231(a)(6)). The Court had previously held that, with respect to one of the three categories, the phrase "may be detained beyond the removal period" meant that the aliens could be detained "only so long as 'reasonably necessary' to remove them from the country." *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 689, 699 (2001)). The question presented in *Clark* was whether that limitation applied to another of the categories of aliens as well. *Id.* at 378. This Court held that the answer "must be yes" because the operative statutory language "applies without differentiation to all three categories of aliens that are its subject," so that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id. Clark* dooms petitioners' attempt to give multiple meanings to the phrase "civil action under section 3730" because, as with the statute in *Clark*, this umbrella term applies without differentiation to both subsections of Section 3731(b).

Even if this Court were convinced that Congress might have intended the meaning of the umbrella term "civil action under section 3730" to vary according to subsection, that argument would be foreclosed by Section 3731(b)'s coda. Congress did not merely provide that Section 3731(b) applies to "civil action[s] under section 3730"—it also instructed courts to apply "whichever" of the two available limitations periods "occurs last" *to each such action*. The resulting statutory sandwich makes it impossible for "civil

action under section 3730" to mean one thing with respect to Section 3731(b)(1) and another thing with respect to Section 3731(b)(2), because the two subsections work in tandem, setting up alternative time limits applicable to a single action. Petitioners' argument, therefore, must be that the term "civil action under section 3730" does not just have different meanings with respect to Sections 3731(b)(1) and 3731(b)(2), but also means one thing with respect to declined relator suits, in which case Section 3731(b)(1) alone applies and the coda disappears, and another thing with respect to suits initiated by the government or in which the government has intervened, in which case either Section 3731(b)(1) or Section 3731(b)(2) might apply and the coda magically reappears. This stretches the statute's language past its breaking point.

It gets worse. Petitioners' interpretation requires "civil action under section 3730" to assume different meanings *in the same civil action*. According to petitioners, before the government decides whether to intervene in a relator's suit, the suit qualifies as a "civil action under section 3730" for the purposes of Section 3731(b)(1), but not Section 3731(b)(2) or the coda. But then, if the government intervenes, that same relator-initiated action suddenly becomes a "civil action under section 3730" for purposes of Section 3731(b)(1) or Section 3731(b)(2), and the coda decides which one. Surely Congress did not intend the meaning of "civil action under section 3730" to be indeterminate until the government decides whether to intervene.

The statutory context confirms respondent's interpretation. In Section 3731(c), which is

immediately adjacent to the statutory provision at issue in this case, Congress demonstrated that it knows how to write special rules for subsets of civil actions under Section 3730. Congress provided that, "[i]f the Government elects to intervene and proceed with an action brought under 3730(b)" and files its own complaint in intervention, then "[f]or statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action." 31 U.S.C. § 3731(c). Thus, Congress recognized a distinction between actions brought by the government itself under Section 3730(a) and actions brought by relators under Section 3730(b)—and it further provided a special statute of limitations rule that applies only if the government elects to intervene. But of course, Congress did no such thing in Section 3731(b).[2]

Elsewhere, when the FCA distinguishes between the rights of relators and the rights of the government, it does so expressly. *See, e.g.*, 31 U.S.C. § 3730(b)(4)(A) (permitting the government to take over a relator-initiated action); *id.* § 3730(c)(1) (granting the government primary responsibility for conducting an intervened suit); *id.* § 3730(c)(2)(A) (permitting the

---

[2] Outside the FCA, Congress has demonstrated that it knows how to write a statute of limitations that provides different limitations periods for different types of actions. *See, e.g.*, 28 U.S.C. § 3306(b) (setting forth different limitations periods for different types of fraudulent transfer actions); 42 U.S.C. § 9613(g)(2) (different limitations periods for different types of actions under the Comprehensive Environmental Response, Compensation, and Liability Act).

government to dismiss an intervened action without the relator's consent); *id.* § 3730(c)(2)(B) (permitting the government to settle an intervened suit without the relator's consent); *id.* § 3730(c)(3) (permitting the relator to pursue a declined action). Section 3731(b)(2) contains no such distinction between relators and the government. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (alteration in original) (internal quotation marks omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Petitioners make their own appeal to statutory context. *See* Petr. Br. 3, 10-11, 13-15, 17-18, 21, 39. They identify various features of the FCA suggesting that the limitations period of Section 3731(b)(2) is available to the government—*e.g.*, that the phrase "official of the United States" appears in the subsection, and the fact that the statutory language was cribbed from a statute of limitations for claims by the United States. At most, these citations prove a proposition that nobody is disputing: that Section 3731(b)(2) is intended to help the government. But it does not follow that Section 3731(b)(2) is available *only* to the government. As explained in detail in Part B, *infra*, the principal way that Congress sought to help the government in 1986 was by encouraging more qui tam suits; thus, Congress understood that helping relators also necessarily helps the government.

The sparse and oblique contextual clues petitioners cite cannot overwhelm the contrary evidence of Congress's intent—and they cannot support the radical interpretation petitioners propose. To be sure, this Court regularly relies on statutory context in deciding how broadly a particular statutory term should apply—as it did in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), where the Court reasoned that the phrase "civil action under section 3730" must exclude retaliation actions altogether. But this Court has never suggested that context can give a single statutory term two concurrent, irreconcilable meanings, in violation of the clear rule set forth in *Clark*. Indeed, in *Clark* itself, the Court acknowledged that "the statutory purpose and the constitutional concerns" that had motivated its prior decisions did not apply with equal force to aliens who had not been admitted to the United States. 543 U.S. at 380. But it held that this difference "cannot justify giving the same detention provision a different meaning when such aliens are involved." *Id.*

Searching for ambiguity in a clear statute, petitioners invoke the canon against superfluity, arguing that applying Section 3731(b) to claims brought by relators would cause Section 3731(b)(1) to become "'superfluous in nearly all' relator-initiated cases in which the United States does not intervene." Petr. Br. 27 (quoting *United States ex rel. Sanders v. N. Am. Bus Indus.*, 546 F.3d 288, 295 (4th Cir. 2008)). This argument fails for two reasons.

First, reliance on the canon against superfluity is misplaced here: Even petitioners do not argue that subsection (b)(1) would be rendered entirely superfluous; they simply argue that it would govern fewer cases. The canon against superfluity, however, is not a canon against relative disuse under specific circumstances; rather, it forbids statutory interpretations that render provisions "inoperative or superfluous, void or insignificant." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 393 (2013) (internal quotation marks omitted) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Petitioners have not shown that applying the statute of limitations as written would produce that result. They speculate that cases in which "the government learned about the fraud within the first three years of its occurrence but then declined to file its own suit" are "likely to be rare." Petr. Br. 28. Even if the Court takes that statement at face value, it does not establish superfluity. But the Court should not take that statement at face value. Petitioners cite no authority to support it, and in fact they contradict themselves later in their brief. In making their alternative argument that relators become "officials of the United States" for purposes of Section 3731(b)(2), petitioners ask this Court's solicitude for precisely those cases where the government "learned about the alleged fraud the day after it occurred but decided not to file suit due to resource constraints," Petr. Br. 44 (cases that, it bears mentioning, would be barred by petitioners' primary argument).

Second, rendering the shorter limitations period in subsection (b)(1) less salient was the entire point of the 1986 amendment to Section 3731(b). Congress

added a longer statute of limitations, and compelled courts to apply whichever limitations date "occurs last," for a reason: it wanted subsection (b)(1) to apply in fewer cases. The fact that subsection (b)(2) will apply in some cases—or even in most—does not mean that subsection (b)(1) has been rendered superfluous; it means that the statute works as intended.

2. *This Court's decision in* Graham *does not support petitioners' interpretation; it does the opposite.*

In a plea to ignore the plain text, petitioners turn to *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), claiming that the case "explicitly disavowed" a "hyperliteral" reading of Section 3731(b). Petr. Br. 3. Petitioners all but ignore the unique facts of that case, which resolved an entirely unrelated question: whether Section 3731(b) applies *at all* to FCA retaliation claims. *Graham*, 545 U.S. at 414. Retaliation claims obviously present different concerns than fraud claims under the FCA. Most clearly, they do not accrue when the fraud occurs; they accrue when the retaliation occurs.[3] Mindful of the distinction, *Graham* read the term "civil action under Section 3730" to include government and relator actions under subsections 3730(a) and (b), but not

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[3] Antiretaliation provisions routinely have distinct statutes of limitations from the substantive provisions of a statute, for exactly the reasons the Court identified in *Graham*. *See, e.g.*, 7 U.S.C. § 26(h)(1) (establishing a separate statute of limitations for commodities whistleblowers); 15 U.S.C. § 78u-6(h)(1) (same for securities whistleblowers); 18 U.S.C. § 1514A(b)(2)(D) (same for whistleblowers under the Sarbanes-Oxley Act).

retaliation actions under subsection 3730(h), thereby avoiding the bizarre result that a retaliation action might otherwise be "time barred before it ever accrue[d]." *Id.* at 421. But while *Graham* illustrated the principle that the statute may be read narrowly to avoid absurd results, it never once suggested that the same statutory term could be read two different ways at the same time.

In fact, to the extent *Graham* has anything to say about this case, it supports respondent's interpretation. The Court in *Graham* frequently drew a distinction between retaliation claims on the one hand and actions for fraud on the other. *See* 545 U.S. at 415-18 (repeatedly and consistently distinguishing between "§§ 3730(a) and (b)" actions (fraud actions) and "§ 3730(h)" retaliation actions). The post-*Graham* amendment to Section 3730(h) ratified this distinction by creating a special statute of limitations for retaliation claims while leaving Section 3731(b) as the operative statute of limitations for all fraud claims. *See* 31 U.S.C. § 3730(h)(3) (providing a limitations period of "3 years after the date when the retaliation occurred").

3. Petitioners' interpretation is not compelled by any "default rule" of statutory interpretation.

Petitioners fall back on "[d]efault limitations rules," arguing that it would be anomalous for tolling provisions to turn on the knowledge of a non-party. Petr. Br. 22-26. Where Congress has spoken, however, the plain meaning of the statute trumps every default rule. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). For the many reasons given above, that is the case here.

In any event, petitioners misstate the default rule. In fraud cases, statutes of limitation often run from the date the *victim* "discovers" or should have discovered her injury. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 644-45 (2010); *see also* 37 Am. Jur. 2d Fraud and Deceit § 333 (2019). Because the victim is almost always the plaintiff in the ensuing case, the discovery rule normally turns on "the knowledge and actions of *the plaintiff*, not a third party." Petr. Br. 24 (quoting *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012)).

But the victim's knowledge controls even when the victim is not the plaintiff. Here, respondent is not the fraud victim; he sues "as a partial assignee of the United States." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 & n.4 (2000) (emphasis omitted). Generally, "an assignee cannot maintain a claim in the face of a limitations defense that would have trumped the same claim had it been brought by the assignor," even though the assignor, by definition, is unlikely to be a party to the case. 51 Am. Jur. 2d Limitation of Actions § 61 (2019); *see also FDIC v. Bledsoe*, 989 F.2d 805, 809-810 (5th Cir. 1993) (reasoning that FDIC's six-year period for collecting on debt obligations applies to FDIC's private assignees, even where private parties would enjoy a shorter period if suing on their own claims); 6A C.J.S. Assignments § 133 (2018). This rule is long-standing. *See, e.g.*, *Avery v. Cleary*, 132 U.S. 604, 610-12 (1890); *see also Campbell v. Wilson*, 13 D.C. (2 Mackey) 497, 500-01 (D.C. 1883).

Put simply, for assigned claims, applying a discovery rule makes the claim's timeliness turn on a nonparty's knowledge. This Court recognized as much over a century ago, when Justice Harlan held that a second bankruptcy trustee could not claim the benefit of the discovery rule where an earlier trustee—not party to the litigation—had reason to be on notice of a potential suit. *Avery*, 132 U.S. at 610-12. Today, bankruptcy trustees' claims are routinely evaluated based on what non-party debtors knew or should have known prior to bankruptcy. *See, e.g.*, *In re Marchese*, Bky. No. 16-13810 ELF, 2018 WL 3472823, at *8 (Bankr. E.D. Pa. July 16, 2018); *In re Stotz Fredenhagen Indus., Inc.*, 554 B.R. 777, 783 (Bankr. D.S.C. 2016); *In re Wagner*, 530 B.R. 695, 705 (Bankr. E.D. Wis. 2015). Similarly, survivors' and estates' claims often turn on the knowledge of the decedent. *See, e.g.*, *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 393 (8th Cir. 1986); *Gustavson v. United States*, 655 F.2d 1034, 1036 (10th Cir. 1981); *Georgia-Pacific Corp. v. Benjamin*, 904 A.2d 511, 533-34 (Md. 2006).

Sometimes (as in qui tam actions), the plaintiff-assignee will learn about the fraud before the victim. But the knowledge of the victim remains determinative. *See, e.g.*, *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. KG.*, 510 F.3d 77, 89 (1st Cir. 2007) (reasoning that the statute of limitations should run from the date the copyright purchaser and ultimate plaintiff informed assignors of their potential claims by purchasing them, even though the purchaser learned of those claims earlier); *Haugh v. Allstate Ins. Co.*, 322 F.3d 227, 231 & n.5 (3d Cir. 2003) (where insured party

assigns failure-to-settle claims against his liability insurer to the opposing party, "the critical question" to applying the discovery rule remains when the insured party knew or should have known about the insurer's rejection of the assignee's settlement offer, not the earlier date when the assignee [and current plaintiff] learned that the insurer had rejected his offer).

Petitioners mention the assignor-assignee context only in a footnote, citing four cases supposedly establishing that the assignee's knowledge should trigger the limitations clock. Petr. Br. 43 n.9. In fact, three of the four come out the other way. *See Bierman v. Int'l Bus. Machs. Corp.*, 547 F. App'x 851, 852-53 (9th Cir. 2013) (affirming dismissal of assigned claim because assignee, Bruce Bierman, failed to adduce evidence that the non-party assignor, Sonia Bierman, lacked constructive knowledge of her claim); *SBAM Partners v. Oh*, No. B168187, 2004 WL 2580424, at *5 (Cal. Ct. App. Nov. 12, 2004) (affirming dismissal because SBAM Partners, the plaintiff-assignee, failed to plead facts showing that non-party assignor Seoul Bank lacked constructive knowledge of its claim); *CitiMortgage, Inc. v. Parille*, 49 N.E.3d 869, 884 (Ill. App. Ct. 2016) (holding that the limitations clock started in September 2003, based on facts known or reasonably knowable to a claim's assignor); *id.* at 874 (explaining that the claim was assigned to CitiMortgage, the plaintiff in the case, on July 16, 2010).[4] And the fourth is unrelated; in three short

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[4] Petitioners point to language in *Bierman* and *SBAM* suggesting that the assignee's knowledge is also "relevant," Petr. Br. 43 n.9, but fail to explain why the assignee's knowledge was

paragraphs, it declines to equitably toll a statute of limitations until after a court decision in a related matter, noting along the way that the plaintiff (who happened to be an assignee) had two months to sue after the court decision even without tolling. *Silva v. Allstate Ins. Co.*, 304 F. App'x 609, 611 (9th Cir. 2008).

By tying Section 3731(b)(2) to the victim's knowledge, Congress simply codified the common law rule. The two most populous states have adopted the same rule, further undermining petitioners' allegation of novelty. California's False Claims Act mirrors the federal statute, and its courts have construed it consistent with respondent's interpretation. *State ex rel. Hindin v. Hewlett-Packard Co.*, 62 Cal. Rptr. 3d 762, 764, 766-67 (Cal. Ct. App. 2007). And the Texas statute explicitly specifies that when the "state declines to take over the action," the relator may sue either six years after the fraud occurred or "up to three years from the date *the state* knows or reasonably should have known facts material to the unlawful act, whichever of these two periods is longer." Tex. Hum. Res. Code Ann. § 36.104(b) (emphasis added). In short, Section 3731(b) does not "break new legal ground" or "depart from settled default tolling principles," Petr. Br. 26; it ratifies them.

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relevant. In *Bierman*, the plaintiff was suing on both a claim that originated with him and as an assignee of his mother's claim; he was barred as to both claims because he produced no evidence as to either his or his mother's inability to discover the injury earlier. 547 F. App'x at 852. In *SBAM*, the assignee's post-assignment knowledge was relevant to determining when the clock should start running only if the assignor's pre-assignment knowledge had not already triggered it. No. B168187, 2004 WL 2580424, at *5.

If anything, it is petitioners' interpretation that would create an anomaly. Ordinarily, when a lawsuit is filed, the parties ought to be able to tell whether the statute of limitations has run. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 14 (2014) (describing statutes of limitations as "foster[ing] . . . 'certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). But under petitioners' interpretation, the applicable statute of limitations in qui tam cases remains in flux until the government makes its intervention decision (often years after the suit is filed). Petitioners do not identify—and we have not discovered—any other statute of limitations that works this way.

B. Respondent's interpretation is most consistent with the purposes of the False Claims Act and the 1986 Amendments.

1. Respondent's interpretation would protect the government's interests and conserve public resources.

The purpose of the FCA and the 1986 Amendments in particular is to enhance the government's ability to recover damages for frauds against it, especially through qui tam actions. Respondent's interpretation serves that purpose by allowing meritorious declined qui tam suits to proceed. Petitioners' interpretation would subvert that purpose by limiting the government's ability to recover and forcing it to expend its own resources instead of relying on private relators.

When Congress amended the statute, qui tam actions were few and far between. S. Rep. No. 99-345,

at 4-6 (1986). Despite the government's own enforcement efforts, the problem of contracting fraud had grown "severe" and was only getting worse. *Id.* at 2. Congress believed that "only a coordinated effort of both the Government and the citizenry w[ould] decrease this wave of defrauding public funds." *Id.* Congress therefore amended the FCA with the express purpose of encouraging relator suits. Such suits facilitate the detection of frauds that the government would otherwise never see while conserving scarce government resources.

Congress's effort succeeded. The 1986 amendments revitalized qui tam litigation, resulting in substantial benefit to the government. Since 1986, the government has recovered more than $42 billion in qui tam actions, including $2.4 billion in cases in which the government declined to intervene. *See* Fraud Statistics - Overview, Civil Div., U.S. Dep't of Justice (Dec. 21, 2018), https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

Petitioners' interpretation is at odds with Congress's purpose. First and foremost, under petitioners' rule, the government would surely recover less. Some meritorious cases would be time-barred altogether. And in qui tam actions to combat ongoing fraud, damages would be limited to a six-year window. In fact, petitioners' rule might not just reduce recoveries in these cases, but eliminate them altogether: would-be relators may be deterred from coming forward if they worry that their claims may be time-barred; and they may also have trouble finding a lawyer willing to pursue a case with a compressed

damages window. The government's recoveries would undoubtedly suffer.

It is no answer that the government could rescue these cases by intervening. A relator and his counsel cannot know, in advance, whether the government will intervene, and that uncertainty may deter relators from coming forward. But even assuming that the government would intervene in every meritorious case, that merely highlights another problem with petitioners' interpretation: it would force the government to expend its own resources on cases it could otherwise leave to relators, lest the recoveries be lost altogether. *See* Transcript of Oral Argument at 48-49, *Universal Health Servs., Inc. v. Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7) (explaining that the government would feel "pressured" to intervene if it "believed that courts would draw . . . an adverse inference" from a decision not to). That would undermine the 1986 Congress's desire to save public enforcement resources for cases where they are most needed.

Critically, as petitioners admit, the government makes intervention decisions based on a variety of factors, many unrelated to the merit of the case—including a desire to save resources, confidence in the relator and her counsel, and calculations of expected gain. *See* Petr. Br. 34; Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, on Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A) at 1 (Jan. 10, 2018). In other words, the government often leaves meritorious cases in the hands of relators and their counsel. These declined cases are cost-efficient because the government keeps at least 70% of the

recovery without the expense of litigating the action. *See* 31 U.S.C. § 3730(d). Yet petitioners would single out these cases for the worst treatment. They would also make it impossible for the government to change its mind and intervene later, for good cause. *See id.* § 3730(c)(3).

2. Petitioners' legislative history citations are unpersuasive.

Petitioners have no answer to the legislative history establishing the actual purpose of the 1986 amendments. Instead, they gather snippets of legislative history stating that Section 3731(b)(2) was meant to aid the government by giving it more time. Petr. Br. 35-39. As with petitioners' appeal to statutory "context," none of this evidence suggests, let alone proves, that Congress intended to exclude relators from the provision's ambit. Indeed, as just shown, Congress strongly believed that helping relators helps the government.

At its core, petitioners' argument is this: if the statute works as written, it reaches beyond the problem Congress identified. But even if that were true, "[I]t is not for [the Court] to rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [the Court] think[s] Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). It is often the case that a statute "go[es] beyond the principal evil" that Congress sought to address. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

3. Respondent's reading creates no practical difficulties.

Lacking footholds in text, purpose, and history, petitioners turn away from the statute and raise a handful of imagined policy concerns. None are persuasive.

First, petitioners imagine that relators will sit on claims of ongoing fraud to pad the damages. Petr. Br. 28-29. They have not identified a single person who has ever done this. In fact, the FCA incentivizes relators to bring claims of ongoing fraud promptly regardless of the applicable statute of limitations. The prospective relator's claim will be barred if a different relator files a claim based on the same facts. *See* 31 U.S.C. § 3730(b)(5). This first-to-file bar creates a winner-take-all race to the courthouse among all potential relators, creating a uniquely powerful incentive for quick filing. A relator's claim will also be barred if the underlying facts of the fraud are first publicly disclosed in a government "report, hearing, audit, or investigation," or in the news media, unless the government permits the suit to proceed. *See id.* § 3730(e)(4)(A)(ii). And her claim will be barred if the government discovers the fraud on its own and brings "a civil suit or an administrative civil money penalty proceeding." *Id.* § 3730(e)(3). Importantly, all of these provisions address concerns about delay without undermining relators' ability to recover on the government's behalf. Petitioners' rule, on the other hand, would harm the government for the reasons given above.

In any event, petitioners' unsubstantiated supposition that bad faith motivates relators to delay filing is remarkably cynical. *See generally* Peter S.

Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 Calif. L. Rev. 1, 37-44 (2017). A delayed qui tam suit is far more likely to reflect the structural obstacles faced by relators than a relator's bad faith. The ordinary citizen does not know about the FCA and its protections from retaliation, nor exactly when unsavory conduct crosses the line into illegality. Employees of large companies often assume that what they are being directed to do has been vetted by the company and is legal. Likewise, they may have signed a broadly-worded non-disclosure or confidentiality agreement that, on its face, appears to bar whistleblowing. Some workers take years to realize that they are enmeshed in an ongoing fraud—especially when the defendant has been actively concealing it. Still others may only discover fraud belatedly after a transfer or promotion gives them greater insight into the defendant's activity. And most attempt to resolve their concerns internally before deciding to sue. Even then, relators must familiarize themselves with the applicable law, and seek legal counsel on their own—which itself can take significant time.

What's more, the dangers of coming forward are significant and chilling; relators put themselves at risk of retaliation, professional blacklisting, and worse. Many lose their jobs, health insurance, and 401(k) plans. Some face even greater financial devastation, including the loss of their homes. Coming forward can also take a personal toll: filing a relator suit often leads to divorce, stress-induced health problems, and despondency. *See, e.g.*, Sheelah Kolhatkar, *The Personal Toll of Whistleblowing*, The New Yorker (Feb. 4, 2019), https://www.newyorker.com/magazine/2019/

02/04/the-personal-toll-of-whistle-blowing (describing a physician who identified a multimillion dollar fraud scheme, but in the process lost his job and fell into depression); Aaron S. Kesselheim et al., *Whistleblowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 New England J. Med. 1832, 1836 (2010) (describing consequences of whistleblowing, including financial difficulties, divorce, and stress-related health problems "including shingles, psoriasis, autoimmune disorders, panic attacks, asthma, insomnia, temporomandibular joint disorder, migraine headaches, and generalized anxiety").

As an illustration, Jim Holzrichter is one of many who have endured these costs firsthand: he lost his home and almost his life. While working for Northrop Grumman, Mr. Holzrichter discovered extensive fraud in the building of the B-2 stealth bomber. Not only was Northrop inflating the costs of materials, but it was charging the government for material not used and lying about its construction progress. Mr. Holzrichter reported the matter internally, but his company supervisor told him to keep quiet.

He could not. He filed a qui tam suit under the FCA, but his choice almost cost him everything. He lost his job and was blacklisted in the industry. He and his family were homeless until he could earn enough from his new newspaper-delivery job to move them into subsidized housing. The Department of Justice declined to intervene in his suit three years after he filed it, but Mr. Holzrichter pressed on. Nine years later, the government changed its mind and intervened. Four years after that—and a full sixteen years after Mr. Holzrichter filed suit—Northrop

settled for $62 million. *Whistleblower Stories*, Taxpayers Against Fraud, https://taf.org/whistleblower-stories/ (last visited Jan. 25, 2019); Dick Carozza, *Vindication at a high price*, Fraud Magazine, July-Aug. 2015, https://www.fraud-magazine.com/article.aspx?id=4294989043 (last visited Jan. 25, 2019).

Congress in 1986 understood that the only way to stop a wave of fraud against the United States was for courageous whistleblowers like Mr. Holzrichter to step forward. It therefore sought to remove stumbling blocks in relators' paths—not create new ones.

Second, petitioners threaten "burdensome and time-consuming" discovery into the government's knowledge. Petr. Br. 33. But even if faithfully applying Section 3731(b)(2) would result in such discovery, the additional burdens would be minimal. For one, identical discovery already occurs in intervened qui tam suits and government suits relying on Section 3731(b)(2), neither of which would be barred by petitioners' interpretation. And as the Eleventh Circuit noted, government knowledge is often subject to discovery even in declined cases because it "may be relevant to the merits of the relator's FCA claim." Pet. App. 22a n.10. Any additional discovery burden is insignificant and hardly justifies a departure from Section 3731(b)'s plain text. Of course, the government also has the ability to contest overbroad discovery requests in court, and district courts are fully competent to manage that process.

Third, petitioners compare two hypotheticals: one where the "relator learns about fraudulent activity one day after it occurred," and one where the government does. Petr. Br. 26-27. Petitioners assert that the relator in first scenario could have ten years to file a

claim under Section 3731(b)(2) "as long as the government did not learn about the fraud in the interim," but in the second scenario, "the government would have only six years to file suit" under Section 3731(b)(1). *Id.* Petitioners point to these two scenarios to allege that the "Eleventh Circuit's rule would lead to the anomalous result that relators would have a longer period to sue than the government in some scenarios." Petr. Br. 26. That is incorrect. When the relator has the benefit of Section 3731(b)(2), so does the government, because the government retains the right to intervene in the case. 31 U.S.C. § 3730(b)(4). In any event, as explained above, relators have every incentive to file their claims promptly.

II. A qui tam relator is not "the official of the United States charged with responsibility to act in the circumstances."

A. The plain text of the statute forecloses petitioners' alternative argument.

Having just argued that Section 3731(b)(2) is unavailable to relators because the statute "refers only to an 'official of the United States,'" Petr. Br. 10, petitioners try out the polar opposite idea. Now, they urge that relators *are* officials of the United States, and that the three-year limitations period begins with their knowledge of fraud—but only once the government declines to intervene. Petr. Br. 40. That tortured interpretation is, petitioners say, "compelled by the broader statutory context in which the provision must be read"—but only if the Court "decides that relators are permitted to invoke Section 3731(b)(2)." *Id.*

The words Congress used in Section 3731(b)(2) could hardly be clearer. That provision offers an

alternative three-year limitations period that begins when facts material to a false claims action are actually or constructively known by "the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). Congress could have used language starting the clock when "the person bringing the action" or "the plaintiff" learns of fraud against the government. It also could have created different statutes of limitations depending on whether the government had intervened. But it did not.

Simply put, only government employees—not relators—can be "official[s] of the United States." An "official" is "[s]omeone who holds or is invested with a public office" or who is "elected or appointed to carry out some portion of a government's sovereign powers." *Official*, Black's Law Dictionary (10th ed. 2014). That definition is especially appropriate here, where the statute refers to not any official, but specifically to an official "of the United States." After all, the FCA consistently distinguishes between relators and the government. *See, e.g.*, 31 U.S.C. § 3730(b)(1) (referring to qui tam actions as "[a]ctions by private persons"); *id.* § 3730(c)(3) (providing that "[i]f the *Government* elects not to proceed" with a qui tam action, "the *person who initiated the action*"—*i.e.*, the relator—"shall have the right to conduct the action" (emphasis added)); *see also id.* §§ 3730(b)(5), 3730(c)(2)(A)-(B), 3730(c)(4), 3730(d). And as petitioners concede, Section 3731(b)(2) "does not expressly mention relators" at all. Petr. Br. 18; *see also* Petr. Br. 40. The only plausible conclusion is that the three-year limitations period does not turn on a relator's knowledge.

Nevertheless, petitioners contend that "official of the United States" is broad enough to encompass private persons acting in the government's interest. *See* Petr. Br. 41. For support, petitioners point to a statute criminalizing bribery of a "public official," defined broadly to include "an officer or employee or person acting for or on behalf of the United States." 18 U.S.C. § 201(a)(1). But this statutory definition of a markedly different term applies only "[f]or the purpose of [section 201]." *Id.* § 201(a). Besides, the broad definition of "public official" in Section 201 is an outlier: similar terminology in other statutes clearly refers to government officials. *See, e.g.*, 5 U.S.C. § 3110(a); 25 U.S.C. § 2806(d); 41 U.S.C. § 2101(5). At any rate, Section 201's expansive definition shows that Congress knows how to give a term broader sweep than its ordinary meaning would suggest—something it declined to do for purposes of Section 3731(b)(2). *Cf. Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

Independently, the FCA cannot be read to "charge[]" relators "with responsibility" to combat fraud. It speaks permissively, stating that relators "*may* bring a civil action for a violation of section 3729," 31 U.S.C. § 3730(b)(1) (emphasis added), and that they "shall have the *right* to conduct the action" if the government declines to intervene, *id.* § 3730(c)(3) (emphasis added). This permissive language contrasts with the language used to describe the obligations of government officials. *See id.* § 3730(a) (mandating that "[t]he Attorney General diligently *shall* investigate a violation under section 3729") (emphasis added). In

short, the Act empowers relators to bring suits to combat fraud, but does not "charge" them with the "responsibility" for doing so. Congress left that duty to government officials.

That's not all. Section 3731(b)(2) refers not to *any* official of the United States, but to "*the*" responsible official of the United States. *Id.* § 3731(b)(2) (emphasis added). Thus, the statute refers to a *specific* official. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("[U]se of the definite article . . . indicates that there is generally only one proper respondent . . . ."). Yet as petitioners would have it, the identity of the official charged with responsibility to act changes the moment the government declines to intervene in a relator's suit, when the relator supposedly becomes *the* official—and nobody actually employed by the government is responsible to act. What's more, the responsibility might revert to the government if it belatedly decides to intervene for "good cause." 31 U.S.C. § 3730(c)(3). That is nonsense. After all, Section 3731(b)(2) does not even mention the intervention decision, let alone make it determinative of the relevant official's identity.

B. Petitioners' interpretation leads to absurd results.

For a related reason, petitioners' interpretation leads to absurd results. According to petitioners, a relator becomes the relevant "official of the United States" *after* the United States declines to intervene in a qui tam action. Petr. Br. 40. In petitioners' view, the declination decision functions as a *de facto* appointment that turns the private relator into a government official.

If that is correct, the three-year discovery period, which begins to run on "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States," would start on the date of declination, *i.e.*, the date the relator became a government official. 31 U.S.C. § 3731(b)(2). But the date of declination invariably falls after the lawsuit has already been filed—which means that the lawsuit was necessarily timely, because it was filed before the three-year period even began to run. Consequently, every declined qui tam action would be subject only to a ten-year limitations period, with no accompanying discovery rule. Congress could not have intended that implication.

Petitioners have no way around this problem. They might argue that even though the relator was not a government official when he learned of the fraud, his knowledge nevertheless had triggered the statute of limitations—unbeknownst to anybody, and only once the government subsequently declined to intervene. But it would be bizarre for a private person's knowledge to trigger the limitations period for the United States, even if that person later became a government official. For example, if a private attorney who had known for two years about a long-running fraud joined the Department of Justice's Civil Fraud Section (or otherwise became a responsible "official of the United States"), the government surely would not have only one year to sue. And if the attorney had known about the fraud for five years, the government's claim would not be automatically time-barred. Instead, in either case, the government would have three years from the date the attorney was hired into the government. The same is true here: if, as petitioners

argue, the relator becomes a government official upon declination, then any three-year clock triggered by the relator's knowledge must start on the date of declination, and not before.

* * *

In effect, petitioners plead for this Court to ignore the statutory text and instead read the phrase "the official of the United States charged with responsibility to act in the circumstances" to mean "any plaintiff." But if Congress intended that result, it would have been easy to write the statute that way. It did not.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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